

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

No. _____

76-1642

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

GENERAL SERVICES ADMINISTRATION; ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; E. E. MITCHELL, DIRECTOR OF CIVIL RIGHTS, GENERAL SERVICES ADMINISTRATION; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE, UNITED STATES DEPARTMENT OF LABOR; PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

and

THE COUNCIL ON ECONOMIC PRIORITIES,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner, Sears, Roebuck and Co. ("Sears"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 1, 1977.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported. The first opinion of the district court (App. E, *infra*) is reported at 384 F. Supp. 996 (D. D. C. 1974). The court of appeals thereafter dissolved an order staying the implementation of the district court's first decision; its opinion is reported at 509 F. 2d 507 ("Sears I"). App. C, *infra*. On January 8, 1975, as a result of the dissolution of the stay, the court of appeals dismissed as moot an interlocutory appeal from the district court's first decision. App. D, *infra*. Subsequently, the district court issued a second opinion and order (App. E, *infra*), reported at 402 F. Supp. 378 (D. D. C., 1975), from which an appeal to the court of appeals was taken. The instant petition seeks review of the court of appeals' final judgment on that second appeal ("Sears II"). App. A, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 18 U. S. C. § 1905 prohibition against public disclosure of confidential private data by a federal agency falls within exemption 3 of the Freedom of Information Act, 5 U. S. C. § 552(b)(3).
2. Whether a federal agency, other than the Equal Employment Opportunity Commission, may publicly disclose employer EEO-1 reports, notwithstanding the prohibitions contained in 42 U. S. C. § 2000e-8(e) and 44 U. S. C. § 3508(a).
3. Whether a private employer's EEO-1 reports and affirmative action plans are exempt from public disclosure by a federal agency under 18 U. S. C. § 1905 and exemption 3 of the Freedom of Information Act.

RELEVANT STATUTES

The Freedom of Information Act ("FOIA") provided, prior to March 12, 1977, in part:

"§ 552 Public Information, agency rules, opinions, orders, records and proceedings.

• • • • •
(b) This section does not apply to matters that are—

• • • • •
(3) specifically exempted from disclosure by statute."

The FOIA, effective March 12, 1977, now provides, in part:

"(b) This section does not apply to matters that are—

• • • • •
(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters to be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

Section 709 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-8, provides in part:

"§ 2000e-8 Investigations—Examination and copying of evidence related to unlawful employment practices.

• • • • •
(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year."

44 U. S. C. § 3508(a), provides:

"§ 3508. Unlawful disclosure of information; penalties; release of information to other agencies

(a) If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency."

18 U. S. C. § 1905, sometimes referred to as the Trade Secrets Act, provides:

"1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

STATEMENT OF THE CASE

As a government contractor, since 1968 Sears has developed and submitted confidential data to the General Services Administration ("GSA"), its federal contract compliance agency, in order to demonstrate compliance with Executive Order 11246 and 11375. Such data was provided with the express understanding that it would not be publicly disclosed. Joint Appendix below ("J. A.") 215 and Supplemental Appendix below ("S. A.") 304-307. Included with the material filed with GSA are separate EEO-1 reports (standard form 100)¹ and affirmative action plans and reports ("APP's")² for each of Sears' stores and other facilities throughout the country.

Sears filed this action when GSA decided to release, over Sears' objections, EEO-1 reports and AAP's for nineteen major Sears retail units, its New York buying offices and Sears' corporate headquarters in response to a request by the Council on Economic Priorities ("CEP"). Prior to discovery GSA moved for summary judgment as did defendant-intervenor CEP.

In its first opinion (App. B, *infra*) the district court granted partial summary judgment to GSA and CEP with respect to Sears' claim that GSA was prohibited from disclosure by virtue of Section 709(e) of Title VII and also found the data not to

1. The EEO-1 reports (35 F. R. 2586, 42 F. R. 3454) are two-page forms printed by the Equal Employment Opportunity Commission ("EEOC") which virtually all employers are required to file with that agency or with the Joint Reporting Committee ("JRC"). These reports reflect for each facility the present job force by nine job categories broken down by race, sex, and national origin, and contain, when applicable, explanations of facility "changes" and "other pertinent data" during the preceding year. 1 CCH Employment Prac. Guide ¶ 1886 (1977).

2. The AAP's contain a detailed "work force analysis," lists of promotions, terminations, hires and promotable employees by name and job in each facility, and each facility's "Long-Range Goals and Timetable Report" which detail the employee force working in the facility and projected expansion or contraction of that force by job. See Title 41 C. F. R. Part 60-2, Sections 60.2.1. *et seq.*

be exempt from disclosure under the subsection (b)(3) exemption of the FOIA and 18 U. S. C. § 1905. The court further concluded that, because Sears' alternative allegations that subsection (b)(4) and (b)(6) of the FOIA exempted the disputed data from disclosure were "not yet ripe for summary judgment," this aspect of the case should be stayed pending further agency review. A subsequent interlocutory appeal from one aspect of the district court's order was taken by Sears, but later dismissed as moot by the court of appeals ("*Sears I*"). App. D, *infra*.

With regard to the bulk of the disputed data, Sears then submitted a detailed position statement to GSA, designating, *inter alia*, those portions of the data which it claimed exempt under subsection (b)(4) of the FOIA. Sears relied, in significant part, upon the affidavits of four experts in the field of competitive analysis that described the substantial competitive advantage such data would afford to Sears' competitors. GSA concluded, nevertheless, in a decision issued January 17, 1975, that none of the data involved was exempt under subsection (b)(4), and transmitted its decision and the parties' submissions to the district court. In that court, Sears renewed its position that Section 709(e) and 18 U. S. C. § 1905 prohibited the threatened disclosure and were incorporated into exemption 3 of the FOIA. The district court, however, in a decision dated September 26, 1975, concluded that "the EEO-1 and affirmative action reports could not be of great usefulness to a Sears' competitor" (App. E, *infra*, p. E-8) and reaffirmed, notwithstanding the intervening decision of this Court in *FAA Administrator v. Robertson*, 422 U. S. 255 (1975), its earlier views concerning the inapplicability of 18 U. S. C. § 1905, as well as Section 709(e) of Title VII, to the disputed data.

Sears appealed to the court of appeals asserting, *inter alia*, that the disclosure prohibitions of 18 U. S. C. § 1905 and section 709(e) of Title VII were applicable to the data in question, and that both statutes fell within the subsection (b)(3) exemption to mandatory disclosure under the FOIA. In its opinion, the court of appeals confirmed its view as expressed in *Sears I* that

GSA would not be acting beyond its administrative powers by disclosing data covered by Section 709(e). With respect to 18 U. S. C. § 1905, the court, while questioning the validity of the previous rule of law in the circuit with regard to the "extent 18 U. S. C. § 1905 falls within exemption 3 of F. O. I. A." (App. A, *infra*, p. A-10), refused to reconsider the view of another panel of the Court (see *National Parks and Conservation Associates v. Kleppe*, 547 F. 2d 673 (D. C. Cir. 1976)) because of "pending matters in the Supreme Court," referring to *Harold Brown v. Westinghouse Electric Corp.*, No. 76-1192, *cert. den.*, _____ U. S. _____ (May 16, 1977), and *The Prudential Insurance Company, et al. v. National Organization of Women, Washington, D. C. Chapter, et al.*, No. 76-1052, *cert. den.*, _____ U. S. _____ (May 16, 1977). *Id.* at A-11. The case was, therefore, remanded to the district court to "give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court." *Id.* at A-11.

REASONS FOR GRANTING THE PETITION

The questions presented are ones that are likely to recur in the administration of the FOIA, and, in fact, have been aptly characterized by the Solicitor General as "steadily increasing."³ Indeed, the instant petition is now the third filed with this Court during the current term presenting related questions. See *Brown v. Westinghouse Electric*, *supra*; and *The Prudential Insurance Company v. National Organization of Women*, *supra*. The instant case provides a superior vehicle for this Court's consideration of the issue. This case, in contrast to the prior petitions,⁴ presents the key questions and is in a proper procedural posture.

3. Petition for Writ of Certiorari, *Brown v. Westinghouse Electric Corp.*, No. 76-1192, p. 11.

4. In *Prudential Insurance*, the petition sought relief before judgment had issued from the court of appeals. In *Westinghouse*, the Solicitor General's petition raised only highly restricted issues

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Due to the impact of the FOIA on variegated private and public interests, this Court has in the recent past resolved numerous cases involving this statute.⁵ Each of these cases, however, only addressed the conflict between the administrative agencies and private parties requesting government data. The instant case focuses upon the neglected interest in the tripartite balance struck by Congress: the rights of private persons who provide data to the agencies to protect its confidentiality.⁶

1. Guidance from this Court defining the scope of such rights is now imperative. 18 U. S. C. § 1905 is a criminal statute which proscribes the disclosure of confidential private data by government agencies. In *Robertson*, this Court acknowledged that Congress, by including exemption 3 in the FOIA, preserved the vitality of "numerous laws then extant allowing confidentiality." 422 U. S. at 266. Section 1905 is one such preexisting statute which specifies an "identified need" that Congress chose to protect. Moreover, it does not, in contrast to the statute at issue in *Robertson*, leave the confidentiality decision to the unbridled discretion of an administrative officer. It expressly requires confidentiality.⁷ The threshold question, there-

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which avoided the critical questions presented here. See, e.g., Brief for the Federal Respondents in Opposition filed in *Prudential Insurance* by the Solicitor General, pp. 9-10. The instant petition is from a decision of the court of appeals and does not restrict the issues presented. Hence, the impediments to review which existed in *Prudential Insurance Company* and *Westinghouse* are not present in the instant case.

5. See, e.g., *Environmental Protection Agency v. Mink*, 410 U. S. 73 (1973); *F. A. A. Administrator v. Robertson*, *supra*; *Sears, Roebuck and Co. v. N. L. R. B.*, 421 U. S. 132 (1975); *Renegotiation Board v. Grumman Aircraft*, 421 U. S. 168 (1975); and *Renegotiation Board v. Bannerkraft*, 415 U. S. 1 (1974).

6. See, Note, *Development Under the Freedom of Information Act—1974*, 1975 Duke L. J. 416, 430-432; *Westinghouse Electric Corp. v. Schlesinger*, 542 F. 2d 1212 (4th Cir. 1976) *cert. den. sub. nom.*, *Brown v. Westinghouse Electric Corp.*, *supra*.

7. Subsequent to *Robertson*, Congress amended exemption 3 to limit its protective scope to those confidentiality statutes in one of

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fore, is, as stated by the court below, "whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak. . . ." App. A, *infra*, p. A-11. This case provides the Court with that opportunity "to speak."

The courts of appeals are, as the court below observed, in conflict; the District of Columbia Circuit's decision "*in National Parks II* [547 F. 2d 673 (1976)] and *Charles River Park* [519 F. 2d 935 (1975)] conflict with that of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*." App. A, *infra* p. A-10. Because of its anticipation that this Court would speak, the court below understandably thought "it inadvisable to express an additional view on the same issue." App. A, *infra*, pp. A-10, A-11. This uncertainty is shared by the United States Court of Appeals for the Ninth Circuit. On April 14, 1977—a full year after oral argument—that court issued an "Order Withdrawing Submission" in a case, presenting issues intimately related to the instant petition, "pending action by" this Court on the petitions filed in *Westinghouse* and *Prudential Insurance Company*. *Hughes Aircraft v. Schlesinger*, 384 F. Supp. 292, *app. pend.*, No. 75-1064. See Appendix F, *infra*. The same issues are also now pending before the United States Court of Appeals for the Third Circuit as well as various district courts. See *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D. Del. 1976) *app. pend.* and pp. 11-12 n.8, *infra*. The instant case provides an appropriate vehicle to resolve the undesirable confusion and to guide the lower courts on an important statutory issue.

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two categories: those that leave "no discretion" to administrators or alternatively those that "establish particular criteria for withholding". Admittedly this amendment does exclude from the scope of exemption 3 the type of discretionary disclosure statute at issue in *Robertson* (49 U. S. C. § 1504), which permitted unbridled administrative power to make disclosure decisions. Criminal statutes, however, like 18 U. S. C. § 1905 (as well as 42 U. S. C. 2000e discussed *infra* at pp. 10-12), which strictly prohibit disclosure of specified types of data, are of a different nature. Accordingly, as acknowledged by this Court in *Robertson*, Sears submits that such non-discretionary prohibitions on government action are still protected by exemption 3.

2. The failure of the court of appeals to acknowledge the application of Section 709(e) of the Civil Rights Act of 1964 to the proposed disclosure of Sears' EEO-1 reports also raises a question warranting review. The authority of GSA to gather information with regard to the compliance by private employers with federal civil rights requirements is founded only upon the authority of an executive order. GSA, however, would here utilize that private data in a manner inconsistent with the express will of Congress. While 709(e) and 44 U. S. C. § 3508(a) criminally proscribe the EEOC and other agencies from publicly disclosing an employer's EEO-1 reports, GSA would nonetheless disclose these very documents. Absent an express delegation to the agency, however, GSA may not "... take measures incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 638 (1952) (Jackson, J., concur). See also the opinion of Mr. Justice Douglas in *Chamber of Commerce v. Legal Aid Society*, 423 U. S. 1309 (1975).

The legislative history of Title VII with regard to the confidential nature of data, such as EEO-1 reports, compels the conclusion that Congress did not intend to permit the public disclosure of these reports. As noted above, when Title VII was enacted in 1964 Congress was not content merely to delegate to the EEOC the authority to determine whether to disclose EEO-1 reports and other such data, but positively banned public disclosure. Cf. *Robertson*, and p. 8 n.7, *supra*. In 1972, when Title VII was amended and the powers of the EEOC were expanded, Congress reiterated its concern for the confidentiality of such data. While encouraging cooperation and the exchange of data between the EEOC and state or local agencies, Congress concomitantly amended Section 709(d) to close a loophole against public disclosure of EEO-1 reports and similar data through the state and local agencies by providing that "... information [furnished upon request by the EEOC to a state or local agency] shall be furnished on a condition that it not be made public by the re-

cipient agency. . . ." 42 U. S. C. 2000e-8(d). Under this amendment, the ban on federal disclosure of the EEO-1 reports under section 709 and 44 U. S. C. § 3508 was extended to state agencies. By the same token Congress also provided for federal cooperation; an Equal Employment Opportunity Coordinating Council, including the Defendant Secretary of Labor and the Chairman of EEOC, was created to promote cooperation in the interchange of data and consistency in the policies and practice of the agencies. No basis exists from which one can conclude that Congress ever contemplated that the administrative agencies would abrogate the confidential status of the EEO-1 reports. Nor was it contemplated that an agency would follow a policy inconsistent with the one prescribed in Congress.

Public disclosure of EEO-1 reports by Department of Labor compliance agencies would, we submit, render nugatory Congress' intent through these amendments to maintain the confidential nature of employer reports under Title VII while, at the same time, encouraging their coordinated use by the EEOC and other agencies. Such disclosure would not only violate that objective, but would seriously impede the EEOC's statutorily required voluntary compliance efforts under Title VII. See 42 U. S. C. 2000e-5(b), 8(e) and 110 Cong. Rec. 12733 (1964) (Sen. Humphrey). Congress' objective can be fulfilled and applied in a consistent manner only if all federal and state agencies utilizing EEO-1 reports are prohibited from disclosing them prior to initiation of judicial proceedings as provided by Congress in Title VII. *Ibid*.

The confidential nature of the EEO-1 reports has been the cause of substantial litigation throughout the nation as employers seek to maintain the confidentiality of sensitive employment data.* A substantial segment of the nation's employers do busi-

8. See, e.g., *Legal Aid Society v. Chamber of Commerce*, 423 U. S. 1309 (1975); *Crown Central Petroleum Corp. v. Kleppe*, 14 FEP Cases 40 (D. Md. 1976); *Holiday Inns, Inc. v. Kleppe*, 13 FEP Cases 1337 (W. D. Tenn. 1976); *Chrysler Corp. v. Schlesin*.

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ness with the federal government as a contractor or subcontractor and face this same conflict.⁹ The question presented is thus a common problem under the FOIA affecting a broad segment of American employers. This Court should answer that question, and correct the erroneous interpretation of the court below with respect to the critical interrelationship of section 709(e) of Title VII and the FOIA.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 23, 1977

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ger, 412 F. Supp. 171 (D. Del. 1976); *Goodyear Tire & Rubber Co. v. Dunlop*, 13 FEP Cases 1734 (D. D. C. 1975); *Robertson v. Department of Defense*, 402 F. Supp. 1342 (D. D. C. 1975); *Legal Aid Society v. Brennan*, 13 FEP Cases 860 (N. D. Cal. 1975); *The Lawyers Cooperative Publishing Co. v. Schlesinger*, No. 1974-212 (W. D. N. Y. July 3, 1974); *Legal Aid Society v. Schultz*, 349 F. Supp. 771 (N. D. Cal. 1972).

9. 41 C. F. R. 60-40-1 *et seq.* The Department of Labor has estimated that there are more than 275,000 nonconstruction contractors subject to Executive Order 11246. See General Accounting Office Report, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved." GAO MWD-75-63, at pp. 31-32 (April 29, 1975).

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 75-2127

SEARS, ROEBUCK AND CO.,

Appellant,

vs.

GENERAL SERVICES ADMINISTRATION, et al.

Appeal from the United States District Court
for the District of Columbia
(D. C. Civil 2149-73)

Argued 15 December 1976

Decided 1 April 1977

Before: ROBB and WILKEY, *Circuit Judges*, and GESELL,*
United States District Judge for the District of Columbia Circuit.

Opinion for the Court filed by *Circuit Judge WILKEY*.

WILKEY, *Circuit Judge*: This is a "reverse" freedom of information case in which appellant Sears, Roebuck & Company has responded with a declaratory judgment action to prevent the intervenor Council on Economic Priorities from securing under the Freedom of Information Act (FOIA)¹ certain EEO-1

* Sitting by designation pursuant to Title 28, US Code Section 292(a).

1. 5 U. S. C. § 552.

reports and affirmative action plans from the defendant General Services Administration. The EEO-1 reports contain data on Sears employees broken down by race and sex, while the affirmative action plans are proposed future action to correct effects of past employment discrimination.

This action is one of several judicial challenges to the Secretary of Labor's new disclosure rules of 2 February 1973,² which altered the previous policy of confidentiality guaranteed data submitted by Government contractors in compliance with Executive Orders 11246 and 11375³ on nondiscrimination. Without reciting in detail the previous procedural steps in both the District Court and this court, which are duly reported,⁴ this appeal is from the opinion and order of 26 September 1975 of the District Court.⁵

In that opinion the District Court reaffirmed its previous rulings that the records here do not fall within two of the Act's exempted categories, 5 U. S. C. § 552(b)(3) (exempted by statute) and (b)(7) (investigatory files), and similarly ruled that the data was not protected by two other exemptions pressed by Sears, (b)(4) (trade secrets and confidential data) and (b)(6) (personnel records). The District Court thus granted summary judgment for the intervenor and summary judgment in part for the defendant GSA.

I. JURISDICTION AND STANDARD OF REVIEW

The jurisdictional basis for this suit is to be found in 28 U. S. C. § 1331(a).⁶ The action arises under the FOIA⁷ and

2. 41 C. F. R. 60-40-1 *et seq.*

3. 3 C. F. R. 169-177 (1974).

4. 384 F. Supp. 996 (D. D. C. 1974), 509 F. 2d 527 (D. C. Cir. 1974).

5. 402 F. Supp. 378 (D. D. C. 1975).

6. There has been considerable confusion in recent cases concerning the proper basis for federal court jurisdiction in reverse FOIA cases. The District Court in this case relied on the APA as a

(Footnotes 6 and 7 continued on next page)

relief is sought pursuant to the Declaratory Judgment Act,⁸ since the FOIA provides for actions requiring disclosure but not actions to prevent disclosure of documents that are in the custody of Government agencies. We agree with the District Court that the "actual controversy" here is whether the records sought are exempt from disclosure under the FOIA, and that Sears has a right to a declaratory judgment on this issue.

The Government's position has shifted somewhat. It initially indicated that it desired to release the records, even if not com-

(Footnote continued from preceding page.)

grant of subject matter jurisdiction. 384 F. Supp. 996, 1000-01. In addition, this court in *Charles River Park "A" Inc. v. HUD* had also relied on Section 10 of the APA for subject matter jurisdiction. 519 F. 2d 935, 939 (1975). The Supreme Court has recently held that Section 10 of the APA is not an implied grant of subject matter jurisdiction to review federal agency action. *Califano v. Sanders*, 45 U. S. L. W. 4209 (23 February 1977).

The recent decision of this court in *Planning Research Corporation v. FPC* held that federal jurisdiction in reverse FOIA cases is properly grounded on 28 U. S. C. § 1331. No. 75-1549, Slip op. at 16, (10 March 1977). We are aware of the recent revision of § 1331 by Congress to eliminate the \$10,000 amount in controversy requirement in civil actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976). We will assume *arguendo*, as did the panel in the *Planning Research Corporation* case, that federal jurisdiction is to "be measured according to the provisions of § 1331 as it stood when the complaint was filed." *Id.* Slip op. at 14 n. 10. Given this premise, we are confident that the \$10,000 requirement of the prior law has been satisfied in this case because of the high value which Sears places on the documents at issue in this case.

We hold in this case that summary judgment was not appropriate on the exemption 4 issue and remand to the District Court for consideration of the applicability of this exemption to the EEO-1 reports and affirmative action plans. See text and notes at notes 10 to 13, *infra*. Thus, it can be stated with some confidence that this action arises under the FOIA itself. See Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 N. W. L. Rev. 995, 1008 (1976). Given this situation, we need not range as broadly in our rationale as the Fourth Circuit did in *Westinghouse* to find federal question jurisdiction under § 1331. See *Westinghouse Electric Corp. v. Schlesinger, et al.*, 542 F. 2d 1190, 1209-14 (4th Cir. 1976).

8. 28 U. S. C. § 2201.

pelled to do so by the FOIA, but its final position in the District Court and here on appeal is that it has not yet determined whether it will release the data, if the ultimate conclusion of the court is that the data is protected by one or more of the exemptions, and thus its release not compelled by the FOIA.

We also agree with the District Court as to the standard of and procedure in review by that court of the agency's action. The District Court is not precluded from a *de novo* consideration of the issues, since this reverse FOIA case is brought as a declaratory judgment action, not for review of agency action under the APA. The review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case. *Charles River Park "A" Inc. v. HUD*.⁹

II. EXEMPTION 4: TRADE SECRETS AND CONFIDENTIAL COMMERCIAL DATA

5 U. S. C. § 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The data which Sears claims falls under exemption 4 is in: First, the EEO-1 reports, which detail employment totals in nine occupational categories, specifically broken down by sex and minority group status of employees in each Sears unit; second, the affirmative action plan, drawn up on the basis of 19 job categories, broken down by race and sex, with specific totals for hiring, promotions, terminations, training, and projected time tables for attaining the objectives.

The critical issue in this case, under exemptions 4 and 3, is whether this data contains "trade secrets" or other confidential material whose disclosure will "cause substantial harm to the competitive position of" the appellant Sears. *National Parks and*

9. 519 F. 2d 935, 940 n. 4, 941 n. 10 (D. C. Cir. 1975). See *Westinghouse Electric Corp. v. Schlesinger, et al.*, 542 F. 2d 1190, 1208 n. 57 (4th Cir. 1976).

Conservation Association v. Morton.¹⁰ On this issue the evidence offered the District Court was conflicting—on which statement is predicated the action we take on this appeal.

Sears filed six affidavits from five experts asserting that from the EEO-1 reports and affirmative action plan employment category totals a knowledgeable competitor could deduce Sears' labor costs, sales volume, plans for expansion, and secure other data valuable to a competitor of Sears. Sears claims these affidavits make a prima facie case for "substantial competitive harm." The intervenor and defendant countered with an affidavit by Dr. Sar Levitan, which asserted that "EEO-1 and the affirmative action reports could not be of great usefulness to a Sears competitor. The information which would be released could provide only the roughest approximation of sales volume, growth patterns, or labor costs. Equally accurate approximations are already possible without the use of these data."¹¹

It is at this point that we part company with the District Judge. In reference to the affidavit of Dr. Levitan, the District Judge stated,¹² "The court embraces his affidavit and adopts his conclusion. . . ." This statement and the recitation from Dr. Levitan's affidavit, quoted in toto above, conclude the District Court's discussion of the exemption 4 issue. The District Court did not specify its reasons for adopting the particular conclusion advanced by Dr. Levitan. The District Court did not recite any facts in the record to which the court gave credence, either as being undisputed or as being preferable in validity to those facts relied upon the six Sears affidavits.

The question of what this data in the reports would mean to an intelligent competitor is a factual issue. The answer to that issue is in the nature of a fact, a factual conclusion if you prefer, but still partaking of the nature of fact. The Sears affidavits make certain factual assertions concerning the nature of the

10. 498 F. 2d 765, 770 (D. C. Cir. 1974).

11. 402 F. Supp. at 384.

12. *Id.*

material in the reports and how this material could be used by intelligent competitors to gain a competitive advantage. For example, the Sears affiants state that the information in the EEO-1 reports and the affirmative action plans cannot be obtained from commercial publications, research services, or other governmental sources. In addition, the claim is made that on-site inspections of Sears' retail units cannot yield the same type or quality of information as provided in the reports. As an example of the use to which the information in the reports could be put by competitors, the Sears affiants assert that the information would be of great use to a competitor in determining where to locate future retail stores. In addition, these affiants state that the reports clearly reveal "promotable" individuals who may be induced to leave Sears and move to a competitor. Dr. Levitan's affidavit attempts to refute the claims of competitive harm put forth in the Sears affidavits. Sears asked more than once for an evidentiary hearing, particularly for the purpose of cross-examining Dr. Levitan after his rebuttal affidavit was filed.

The District Judge believed that there were no factual conflicts which would preclude him from granting summary judgment. "While there are conflicts between the Sears affidavit and those of defendant and intervenor, these conflicts do not raise issues of material fact, but rather concern expert opinions as to the adverse consequences to Sears of release of the EEO-1 and AAP reports."¹³ We think the existence and nature of any "adverse consequences to Sears" are in themselves facts to be ascertained by inquiry. While the "adverse consequences" may be considered as ultimate facts, to be derived from certain undisputed facts in the documents filed by Sears, yet the ultimate facts as to the probable future adverse consequences can only be determined by putting with those undisputed facts other facts within the experts' knowledge to reach the conclusion as to consequences. It is apparent that the five Sears experts and Dr. Levitan relied upon different experience factors to put with

13. *Id.* at 383 n. 8.

the facts in the documents in reaching their differing conclusions as to consequences.

Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure. The District Court thus attempted to resolve the conflict in the ultimate facts without having the evidence before it. There also appears to be a fact conflict as to the availability of this allegedly confidential data to other persons. Summary judgment was not appropriate.

In regard to the kind of adversary proceeding which the District Judge should conduct, he may do so by any means he thinks appropriate, discovery by interrogatories, oral depositions, requests for admissions, or an open hearing in court with or without the preceding discovery procedures. The District Judge permitted the filing of affidavits, but he did not permit discovery by any techniques. We think there is a right of confrontation by the appellant Sears versus Dr. Levitan (and likewise by the opposing parties versus the Sears affiants), and so the parties should have the right to examine the affiants either by depositions or in open court. If the conflicts regarding material facts are not resolved in the proceeding conducted by the District Judge, the case should be tried like any other adversary proceeding and the District Court should make findings of fact and conclusions of law.

III. EXEMPTION 6: PERSONNEL, MEDICAL, AND SIMILAR FILES

The District Judge concluded, in agreement with intervenor Council on Economic Priorities but contrary to Sears' and GSA's contentions, that two categories of information contained in Sears' submitted data were not within exemption 6.¹⁴ The court

14. "(1) [C]omments including reasons why applicants were not hired, reasons employees left Sears, and comments concerning promotions; and, (2) service, termination, and promotion dates." *Id.* at 384.

reached this conclusion "after weighing the public interest in disclosure of these comments and taking into consideration the character of the comments as well as the unlikelihood that it will be possible for members of the public to attach the comments to particular employees of Sears."¹⁵

The balancing analysis made by the District Judge is in accord with our prior decisions in *Rural Housing Alliance v. U. S. Department of Agriculture, et al.*,¹⁶ and *Getman v. NLRB*.¹⁷ Despite the contention of Sears, we do not think that the recently enacted "Privacy Act"¹⁸ would alter the procedure recommended by this court and followed by the District Judge here, nor do we think that the Privacy Act itself puts anything further in the scales for him to weigh.

Therefore, in accordance with the principle that findings on matters of fact by the District Court will not be upset unless clearly erroneous, we must agree with the District Court's decision on this point.¹⁹

IV. EXEMPTION 3: SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE—18 U. S. C. § 1905

Subsequent to both decisions of the District Court a chain of events with regard to the relationship of 18 U. S. C. § 1905²⁰

15. *Id.* at 384-85.

16. 498 F. 2d 73, 77 (D. C. Cir. 1974).

17. 450 F. 2d 670, 674 (D. C. Cir. 1971).

18. 5 U. S. C. § 552(a) *et seq.*

19. Sears' original claim under exemption 7 (investigatory files) is not at issue on this appeal. Nothing has occurred since the action of the District Court in 384 F. Supp. 996 (1974) and this court in 509 F. 2d 527 (1974) to alter the decision and opinions therein, hence no point under exemption 7 is raised on appeal.

20. 18 U. S. C. § 1905. *Disclosure of confidential information generally.*

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law

(Footnote continued on next page.)

to exemption 3 of the FOIA occurred. In *FAA Administrator v. Robertson*²¹ the Supreme Court held that the statute there involved²² was intended to "restrict public access" to the FAA records and did fall within exemption 3 of the FOIA. This court had held to the contrary and the District Court here had relied upon our opinion.²³ Whereupon the Congress enacted an amendment to exemption 3, with the announced intention²⁴ of reversing the Supreme Court's broad interpretation of exemption 3. The applicable statutory subsection, effective 12 March 1977, reads:

(b) This section does not apply to matters that are—

• • • • •

(3) specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld; . . .²⁵

After the statute was amended, but before it became effective, this court decided *National Parks and Conservation Associates*

(Footnote continued from preceding page.)

any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

21. 422 U. S. 255 (1975).

22. 49 U. S. C. § 1504, section 1104 of the Federal Aviation Act of 1958.

23. 384 F. Supp. at 99.

24. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (Conference Report).

25. 5 U. S. C. 552(b)(3), Pub. L. 94-401, 94th Cong. (13 Sept. 1976).

v. *Kleppe (National Parks II)*,²⁶ in which this court reaffirmed its "view that the third exemption 'does not incorporate section 1905 into the FOIA in such a way as to make section 1905 broader than the fourth exemption,'"²⁷ citing our previous decision in *Charles River Park "A", Inc. v. Department of HUD*.²⁸

We recognize that this court's decisions in *National Parks II* and *Charles River Park* conflict with that of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*.²⁹ The Solicitor General has sought certiorari in *Westinghouse*.³⁰ Raising similar issues, several insurance companies have filed a petition for writ of certiorari to this court to review before judgment the companies' appeals from a decision of the United States District Court for the District of Columbia in *National Organization for Women v. Social Security Administration, et al.* and *Metropolitan Life Insurance Company v. Usery, et al.*³¹ Following a denial of a stay by this court,³² the Chief Justice granted a stay³³ pending further consideration by the Supreme Court.

Any reconsideration by us of the issue as to what extent 18 U. S. C. § 1905 falls within exemption 3 of the FOIA and thus forbids the disclosure of the records here (assuming that they fall within the description of § 1905) would necessarily be a reconsideration of the view of a panel of this court in *National Parks II, supra*, expressed most recently in light of both actions by the Supreme Court and Congress.³⁴ While the court in *National Parks II* specifically labeled its views on § 1905 and

26. No. 76-1044 (D. C. Cir., 15 Nov. 1976).

27. *Id.*, Slip Op. at 27, quoting from *Charles River Park*.

28. 519 F. 2d 935, 941 n. 7 (D. C. Cir. 1975).

29. 542 F. 2d 1190, 1203 (4th Cir. 1975).

30. No. 76-1192, filed 28 February 1977.

31. No. 76-1052, filed 1 February 1977; C. A. Nos. 76-0087 and 76-0914, 6 Dec. 1976, as amended 14 Dec. 1976.

32. Nos. 76-2119 *et seq.*, 19 Jan. 1977.

33. A-586 *et seq.*, 45 U. S. L. W. 3517 (1 Feb. 1977).

34. *Charles River Park, supra*, was decided before the Supreme Court decision in *Robertson* and the ensuing Congressional amendment.

exemption 3 as dicta,³⁵ and theoretically we would be free to reconsider the issue, if we deemed it essential to the disposition of this case, yet given the presently pending matters in the Supreme Court, we think it inadvisable to express an additional view on the same issue.

Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court on the aforementioned pending matters. Irrespective of the outcome in the Supreme Court, in reviewing the particular issue the District Judge will doubtless bear in mind, as regards his freedom of action under our own decisions, that this court's views in *National Parks II, supra*, were classed as dicta, and that our views in *Charles River Park, supra*, were expressed before the Supreme Court decision in *Robertson, supra*, or the ensuing Congressional amendatory action. While the amendment to the statute had the effect of excluding § 1104 of the FAA from exemption 3, thus reversing the holding of the Supreme Court on this point, it does seem clear, as the Government appellees here agree, that § 1905 must be "considered independent of the FOIA" exemptions.³⁶ That is, contrary to what we thought in *Charles River Park*,³⁷ the congruence of § 1905 with exemption 4 is immaterial; the threshold issue now is whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak; lacking decisive new guidance by the Supreme Court, the District Court is free to reconsider its view in light of all that has taken place subsequent to its original decision.

For action in accordance with this opinion the case is

Remanded.

35. No. 76-1004, Slip Op. at 26 n. 46 (D. C. Cir., 15 Nov. 1976).

36. Government Br. at 34. See Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Col. L. Rev. 1029 (1976).

37. Note 9, *supra*.

B1

APPENDIX B.

UNITED STATES DISTRICT COURT,
District of Columbia.

Civ. A. No. 2149-73.

SEARS, ROEBUCK AND CO.,

Plaintiff,

vs.

GENERAL SERVICES ADMINISTRATION et al.,

Defendants,

and

THE COUNCIL ON ECONOMIC PRIORITIES,

Intervenor.

Sept. 10, 1974.

As Amended Nov. 12, 1974.

MEMORANDUM AND ORDER.

BRYANT, District Judge.

In this action plaintiff Sears, Roebuck and Company ("Sears") seeks to prevent the disclosure to intervenor Council on Economic Priorities ("CEP" or "intervenor") of EEO-1 forms and affirmative action plans ("AAP's") submitted by nineteen Sears branches to defendant General Services Administration ("GSA" or "agency") and to the Office of Federal Contract Compliance, Department of Labor ("OFCC"), pursuant to Executive Order No. 11,246, 30 F. R. 12319 (1965), as amended by Executive Order No. 11,375, 32 F. R. 14303 (1967), and regulations promulgated thereunder, 41 C. F. R. § 60-2.1 et seq. (Revised

Order 4) and 41 C. F. R. § 60-60.1 et seq. (Revised Order 14).¹

During the summer of 1973, CEP formally requested from defendant GSA copies of plaintiff's EEO-1's and AAP's, pursuant to the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552. Subsequent to that request, plaintiff sought to persuade GSA and OFCC not to disclose those materials. Plaintiff's representatives met and corresponded with defendants from September to December, 1973. At plaintiff's request, release was delayed so that the Freedom of Information Act Committee of the Department of Justice could be consulted. That committee agreed with defendants that the Freedom of Information Act and OFCC disclosure regulations, 41 C. F. R. § 60-40.1 et seq., require defendants to disclose the material sought by CEP.

Plaintiff was repeatedly offered the opportunity to review the requested materials and justify why any particular portion should be withheld under 41 C. F. R. § 60-40.3.² No disclosure

1. EEO-1 reports, required of large government contractors under penalty of contract cancellation, contain statistics concerning the ethnic composition of the contractor's work force. Affirmative action plans outline steps proposed by the contractor to correct effects of past employment discrimination.

2. 41 C. F. R. § 60-10.3, in pertinent part, reads:

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

was to be made until December 10, 1973, to allow plaintiff to avail itself of that opportunity. Throughout this period plaintiff maintained that the requested documents should remain undisclosed in their entirety, and neither specified sensitive portions nor offered to do so.

On December 6, 1973, Sears filed the instant action to enjoin defendants from disclosing EEO-1's, AAP's, and related documents. Sears withdrew its motions for preliminary injunctive relief after defendants stipulated that they would not release any material, absent ten day notice to Sears, pending resolution of this suit. The court granted CEP's motion to intervene on December 26, 1973.

On February 4, 1974, plaintiff and defendants applied for a temporary restraining order to enjoin publication and compel return by CEP of an EEO-1 form inadvertently sent to CEP by GSA. This attempted prior restraint of CEP, a party not bound by GSA's stipulation not to disclose, was denied by the court.

Defendant has moved to dismiss, and plaintiff, defendants, and intervenor have each moved for summary judgment. Discovery has been stayed by stipulation pending this court's disposition of the pending motions.³

JURISDICTION.

At the threshold this court faces the question of jurisdiction. It is clear that the FOIA itself does not confer jurisdiction. The Act was intended to promote disclosure, not to discourage it. Its exemptions provide categories of information which the government is not required to disclose, but it does not in its terms bar voluntary disclosure by the government of information in

3. Also before the court is intervenor's motion for reconsideration of this court's order of August 8, 1974, which denied its request that its counsel and experts be permitted to inspect, under protective order, Sears' EEO-1's and AAP's, and denied its request for a hearing on alleged competitive injury. For reasons outlined below, the court believes that discovery on this issue is premature at this time, and should be denied.

those categories.⁴ And it provides a right to *de novo* court review for those who are denied information, not for those who would suppress it. Sears is not within the class of intended beneficiaries of the Act, and we do not read into the Act an implied private right of action by those who would prevent disclosure.⁵

The Administrative Procedure Act ("APA"), 5 U. S. C. § 701 et seq., however, confers jurisdiction upon this court to consider Sears' claim. In its motion to dismiss the government appears to argue that APA jurisdiction is denied either by the exemption in 5 U. S. C. § 701(a)(2) for "agency action . . . committed to agency discretion by law," or by sovereign immunity. Both objections fail. The agency discretion exemption has been read narrowly to apply only when there is "no law" that can be applied by the court in its review of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). A decision to release information is no less susceptible to court review than a decision to deny disclosure; indeed courts in this circuit have expended great amounts of energy dealing with FOIA cases. And it is settled in this circuit that the APA is a waiver of sovereign immunity.⁶ Thus it seems clear that an agency decision to release data submitted to the agency by a private party is an "agency action" adversely affecting that private party and entitling that party to judicial review.⁷

4. Davis, Administrative Law, § 3A.5 (1970 Supp.).

5. Sears contends that under *Renegotiation Board v. Bannerkraft Co.*, 415 U. S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974), an equity court has inherent jurisdiction over their claim. Sears fundamentally misconceives *Bannerkraft*. The *Bannerkraft* Court, in dicta, said that the explicit injunctive remedy provided by the FOIA is not the exclusive remedy to enforce the right created by the FOIA. *Bannerkraft*, however, did not expand the right (to disclosure) provided by the FOIA.

6. *Scanwell Laboratories v. Shaffer*, 137 U. S. App. D. C. 371, 424 F. 2d 859 (1970).

7. We sympathize with defendants' and intervenor's concerns that allowing review will enable those seeking suppression of infor-

(Footnote continued on next page.)

Accordingly, we need not decide whether jurisdiction is conferred by any other statutes.

SUMMARY JUDGMENT.

All parties have moved for summary judgment. Additionally, Sears has asked for further discovery in the event that its motion for summary judgment is denied, such discovery being needed for Sears to augment its oppositions to defendants' and intervenor's motions. Sears' discovery requests relate to its claims under several exemptions of the FOIA, and will be discussed when we consider those claims, below.

The Freedom of Information Act does not confer jurisdiction over this action, nor do its exemptions make nondisclosure mandatory. But the policies behind those exemptions provide a sound basis for determining whether release of the documents in question would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸ Those policies will be applied.

The Freedom of Information Act is designed to encourage disclosure:

As the Supreme Court said in *Environmental Protection Agency v. Mink*, 410 U. S. 73, 80, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119 (1973),

(Footnote continued from preceding page.)

mation to frustrate the purposes of the FOIA. It should be noted, however, that:

a. Such review extends only to information supplied by private parties.

b. Such review extends only up to such time as disclosure moots the action. We have not required the agency to withhold information pending court review; defendants in this action have taken that step voluntarily. In future actions, the availability of preliminary injunctive relief to preserve the status quo will depend on the usual factors, including likelihood of success on the merits, etc. In short, such preliminary relief need not be automatic.

c. The developing law in this area should lead to a clearer understanding of which items are releasable, reducing the need for judicial review.

8. 5 U. S. C. § 706(2)(A).

"Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."

Section 552(b) of the Act lists categories of information that are exempt from its coverage. In construing these exemptions, the court must do so narrowly and resolve ambiguities in favor of disclosure.⁹ Sears claims that its EEO-1's and AAP's in their entirety should not be disclosable by GSA because of the law and policy articulated in exemptions 5 U. S. C. § 552 (b)(3) (exempted by statute) and (b)(7) investigatory files), and that, in the alternative, portions of those documents should be nondisclosable under exemptions (b)(4) (trade secrets and confidential commercial data) and (b)(6) (personnel records).

Exemption (b)(3).

Exemption (b)(3) applies to material "specifically exempted from disclosure by statute." Sears argues that Section 709(e) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-8(e),¹⁰ should bar disclosure of its EEO-1 reports. Those reports are sent to the Joint Reporting Committee (JRC), which forwards copies to the appropriate federal compliancy

9. *Bristol-Myers Company v. F. T. C.*, 138 U. S. App. D. C. 22, 424 F. 2d 935, 938 (1970), *Fisher v. Renegotiation Board*, 153 U. S. App. D. C. 398, 473 F. 2d 109, 112 (1972), *Soucie v. David*, 145 U. S. App. D. C. 144, 448 F. 2d 1067, 1080 (1971).

10. Section 709(e) reads:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than one year.

agency for Executive Order No. 11,246—in this case the Department of Labor (OFCC)—and to the Equal Employment Opportunity Commission (EEOC). Sears argues that the JRC is in reality an agent or alter ego of the EEOC because it is composed of personnel from EEOC and funded by the EEOC. Hence disclosure by the JRC, or by any agency receiving information from the JRC,¹¹ is barred by Section 709(e).

The difficulty with this argument is that § 709(e) is a criminal statute and must therefore be narrowly read, particularly in light of the requirement of exemption (b)(3) that material be "specifically exempt." And § 709(e), in its terms, applies only to "any officer or employee of the Commission," making public "information obtained by the Commission pursuant to its authority under this section."¹² The documents in question were obtained under the authority not of § 709, but of Executive Orders 11,246 and 11,375.¹³ And they were collected not by the EEOC, but by the OFCC, which has a function separate and distinct from that of the EEOC.

Nor, for the purposes of this statute, are members of JRC "employees" of EEOC. The EEOC could require reporting forms that differ from EEO-1's, and could route them through separate channels. That it does not do so is for reasons of convenience of both contractor and agency, rather than as a bureaucratic subterfuge. The JRC is a mere collection house that collects documents for and distributes them to the authorized agencies. To the extent that JRC collects information

11. Section 709(d) extends the proscription of publication to State and local agencies receiving information from the EEOC.

12. Section 709(c) is the source of EEOC's authority to require reports.

13. Federal law prohibiting discrimination by government contractors predated the Civil Rights Act of 1964, and was embodied in Executive Orders No. 10,925, 26 F. R. 1977 (1961) and No. 11,114, 28 F. R. 6485 (1963). Executive Order 11,246 superseded those Orders.

for OFCC pursuant to Executive Order 11,246, it must be deemed an agent of OFCC, not EEOC.¹⁴

Sears' precise claim was raised, and overruled, in *Legal Aid Society of Alameda County v. Shultz*, 349 F. Supp. 771, at 775-776 (N. D. Cal. 1972). There, plaintiffs sought release of EEO-1's and AAP's from a government agency that opposed disclosure. The court held that disclosure was compelled by the FOIA, despite § 709(e)¹⁵. *A fortiori*, when GSA /OFCC desires to disclose, we hold that § 709(e) does not bar disclosure.¹⁶

We also note that AAP's, which include EEO-1's,¹⁷ are required under 41 C. F. R. § 60-2.1 et seq., and not by the EEOC at all. Hence, regardless of whether § 709(e) is read to bar disclosure of EEO-1's by GSA/OFCC, it cannot bar disclosure of AAP's, which include the data in EEO-1's.

Sears also argues that the documents sought were furnished to the government under express and implied promises of confidentiality, and that disclosure should therefore be barred by 44 U. S. C. § 3508(a), 18 U. S. C. § 1905,¹⁸ and the court's equitable discretion.

14. Sears requests further discovery on questions relating to membership and funding of the JRC. These questions, however, are not material. For purposes of § 709(e), the role of the JRC is determined not by its membership or funding, but by the destination of the forms it collects and the authority under which it collects them.

15. Sears seeks to distinguish *Alameda* on the grounds that 1972 amendments to the Civil Rights Act require independent filing of EEO-1's with the EEOC. 42 U. S. C. § 2000e-8(c-d) (Supp. 1173). The point remains, however, that the documents at issue in this case were collected by GSA/OFCC, not EEOC, pursuant to Executive Orders, not § 709, and would be released by GSA/OFCC, not by EEOC.

16. It may be that legislation extending the proscriptions of § 709(e) to other government agencies would be desirable. That decision, however, is for the Congress.

17. 41 C. F. R. § 60-60.3(b)(1).

18. 44 U. S. C. § 3508(a) states:

If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the

(Footnote continued on next page.)

Neither statute, however, "specifically exempts" documents from disclosure. Section 3508(a) merely provides that applicable law follows documents as they travel from one agency to another. We have already decided that transfer from JRC to GSA/OFCC is not to be construed as transfer from EEOC to GSA/OFCC. Under the relevant Disclosure Rules, 41 C. F. R. § 60-40.1 et seq., disclosure of EEO-1's and AAP's by GSA/OFCC is authorized by law.

Section 1905, similarly, does not expand the prohibitions of other statutes.

"18 U.S.C. § 1905 is a criminal statute prohibiting unauthorized disclosure of any information by a federal employee. There is nothing in the section which prevents the operation of the Information Act. It does not fall within the ambit of Exemption (3). *M. A. Schapiro v. S. E. C.*, 339 F. Supp. 467 (D. D.C. 1972); *Frankel v. S. E. C.*, 336 F. Supp. 675 (S.D. N.Y. 1971), rev'd on

(Footnote continued from preceding page.)

provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information . . .

and 18 U. S. C. § 1905 states:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law: shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

other grounds 460 F.2d 813 (2d Cir.), cert. denied, 409 U.S. 889, 93 S.Ct. 125, 34 L.Ed.2d 146 (1972)."

Robertson v. Butterfield, 498 F. 2d 1031 at p. 1033 n. 6 (D. C. Cir. 1974).

Nor can Sears argue that since the government promised confidentiality, the court should exercise its equitable discretion and refuse to order disclosure: It is well settled in this circuit "that a District Court has no equitable jurisdiction to permit withholding of information which does not fall within one of the exemptions of the Act."¹⁹ "Nor can a promise of confidentiality in and of itself defeat the right of disclosure."²⁰

Hence we hold that disclosure of EEO-1's and AAP's by GSA/OFCC to CEP is not barred by 5 U. S. C. § 552(b)(3).

Exemption (b)(7)

Exemption (b)(7) applies to "investigatory files compiled for law enforcement purposes . . ." Sears argues that EEO-1's and AAP's are gathered as part of compliance procedures under the Civil Rights Act and Executive Orders and are likely to become part of litigation files used in any actions now pending or which may be brought against Sears for non-compliance. In addition, Sears claims that under amendments to Revised Order No. 14, 41 C. F. R. § 60-60.4(d), 39 F. R. 5632, "such information is now expressly 'to be considered part

19. *Getman v. N. L. R. B.*, 146 U. S. App. D. C. 209, 450 F. 2d 670, 672 (1971); *Soucie v. David*, 145 U. S. App. D. C. 144, 448 F. 2d 1067, 1077 (1971). See also *Legal Aid Society of Alameda County v. Shultz*, 349 F. Supp. 771, 776 (N. D. Cal. 1972). See also *Westinghouse Electric Corp. v. Schlesinger*, C. A. No. 118-74-A, E. D. Va., April 2, 1974, Slip opinion p. 9.

Sears argues that summary judgment is inappropriate because further discovery concerning promises of confidentiality allegedly made to Sears is needed. Since we find such promises non-enforceable, whether or not they were made, this issue of fact is not material.

20. *Petkas v. Staats*, 501 F. 2d 887 at p. 889 (D. C. Cir. 1974).

of an investigatory file compiled for law enforcement purposes within the meaning of 5 U. S. C. § 552(b)(7) and . . . shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review."

The purposes behind exemption (b)(7) are:

- [1] to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and
- [2] to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information.

Aspin v. Department of Defense, 491 F. 2d 24 at 29 (D. C. Cir. 1973), quoting *Frankel v. Securities and Exchange Commission*, 460 F. 2d 813, at 817 (2d Cir. 1972). Disclosure will clearly not prejudice the government's case in court since Sears, the potential litigant, already knows the contents of the documents in question. More important, exemption (b)(7) is clearly designed to protect interests of the government only. In this case GSA and OFCC, by their willingness to release the material, have waived those protections. We hold that Sears has no standing to assert an interest of the government when the government has explicitly waived that interest and that exemption (b)(7) gives Sears no interest of its own in non-disclosure.

In arguing that the amended Revised Order No. 14, includes EEO-1's and AAP's within exemption (b)(7), Sears has omitted crucial language from the order. That order, in pertinent part reads:

[D]uring the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under subpart B *except information disclosable under §§ 60-40.2 and 60-40.3 of this title* is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under subpart B shall be treated as

exempt from mandatory disclosure under the Freedom of Information Act during the compliance review." (emphasis added)

EEO-1 reports and AAP's are disclosable under §§ 60-40.2 and 60-40.3. Hence Revised Order No. 14 does not bring the documents in question within exemption (b)(7).

In sum, then, disclosure of EEO-1's and AAP's is not barred by 5 U. S. C. § 552(b)(7). Accord, *Legal Aid Society of Alameda County v. Shultz*, 349 F. Supp. 771, 777 (N. D. Cal. 1972); *Westinghouse Electric Corp. v. Schlesinger*, C. A. No. 118-74-A, E. D. Va., April 2, 1974, slip opinion p. 9.

Exemptions (b)(4) and (b)(6)

Having rejected Sears' claim that its EEO-1's and AAP's should enjoy blanket immunity from disclosure under 5 U. S. C. § 552(b)(3) and (7), we turn to Sears' claim for partial exemptions. Essentially, Sears argues that (b)(4), which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and (b)(6), which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," should bar disclosure of portions of the documents held by GSA/OFCC.

In order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. *Getman v. N. L. R. B.*, 146 U. S. App. D. C. 209, 450 F. 2d 670, 673 (1971), quoting *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802 (S. D. N. Y. 1969), appeal dismissed, 436 F. 2d 1363 (2d Cir. 1971). It is apparent from the requirements of 41 C. F. R. § 60-2.1 et seq. that EEO-1's and AAP's are commercial information obtained from a person. Sears has made no claim of privilege aside from "confidentiality." Hence

the issue narrows to whether the information is "confidential" within the meaning of exemption (b)(4).

The leading case on exemption (b)(4) is *National Parks and Conservation Association v. Morton*, 498 F. 2d 765 (D. C. Cir. 1974). The Court of Appeals there said that:

"commercial or financial is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Footnote omitted)."

(p. 770)

In the present action, the government desires to release the documents, showing its lack of concern that such disclosure will impair its ability to obtain information in the future. Sears, of course, has no standing to raise that argument when the government has waived it. Thus the crux of the issue is whether disclosure of the various EEO-1's and AAP's contain "trade secrets" and whether their disclosure will "cause substantial harm to the competitive position of" Sears.

It appears to the court that this aspect of the case is not yet ripe for summary judgment. Aside from a single affidavit filed by Sears and responsive affidavits filed by GSA and CEP, (as well as legal memoranda filed by all parties,) the record is incomplete on the question of whether disclosure will harm Sears' competitive position.

In its motion for reconsideration intervenor requests further discovery and an evidentiary hearing to develop the facts necessary to decide this issue.²¹ Such a process, however, would present administrative and judicial difficulties. Sears represented at oral argument that the documents in question would be

21. Intervenor, of course, has previously moved for summary judgment, claiming that there are no genuine issues of material fact. Sears has also requested further discovery related to its claims under exemption (b)(3). We have considered those requests above.

"twelve inches thick." It is not clear what role intervenor could play in such a hearing, since the question at issue is whether it should have access to the documents in the first place.²² And the court begins without any agency determination as to whether such documents should fit within the exemption. In light of other "reverse FOIA" suits which may be brought in the future, this burden should not fall totally on the court.

On the other hand, the agency involved, GSA/OFCC, has continually offered to consider specific objections under 41 C. F. R. § 60-40.3 made on the basis of (b)(4) and (b)(6) of the FOIA. Until now, Sears has refused to make such specifications, desiring instead to have its blanket claims decided judicially before proceeding to narrow its request.²³ Now that this court has rejected those blanket claims, it may be that Sears and GSA can reach an agreement regarding at least part of the material. The process should be made easier by intervenor's repeated disclaimer of interest in trade secrets.²⁴ Having had

22. Intervenor argues that confidential commercial information is discoverable (with safeguards) in civil discovery. This may be true, but is inapposite in this action. Civil discovery is limited by requirements of relevancy. When necessary to prepare for a case that is brought for purposes other than for the discovery itself, confidential and private documents may be discoverable. The present action, however, is merely a "reverse FOIA" suit for the documents themselves. To hold that a FOIA claim itself automatically gives rights to discovery that would otherwise be limited by requirements of relevancy would effectively wipe out the protections that exemption (b)(4) was intended to give private parties. Accordingly, intervenor's motion for reconsideration must be denied.

23. Defendant and intervenor argue that this gives Sears "unclean hands," and should bar relief. In the context of an important case of first impression in this Circuit, however, in which Sears has offered to make such specification after judicial resolution of its larger claims, we are unwilling to bar relief to Sears.

24. This should also be possible with respect to Sears' claim under (b)(6). According to *Getman v. N. L. R. B.*, 146 U. S. App. D. C. 209, 450 F. 2d 670, 674 (1971), "(E)xemption (6) requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed; and the statutory language 'clearly unwarranted' instructs

(Footnote continued on next page.)

its day in court on its blanket claims, Sears should exhaust its administrative remedies on its narrower claims before seeking relief from this court. Hence we shall stay the remainder of our disposition pending agency review of Sears' claims under exemptions (b)(4) and (b)(6).

Such review should be conducted in an expedited fashion in view of the amount of time already elapsed since intervenor first requested the documents, and the expedited treatment authorized by the FOIA. The court deems it appropriate that Sears submit its contentions to GSA within 30 days of the date of this order, and that the agency make its final decision (subject to this court's review), within another 60 days.

Sears has argued that the agency's Disclosure Rules fail to provide Sears with a hearing, required by due process. Since those seeking disclosure under the FOIA are not entitled to such an agency hearing, and since the agency's decision will be reviewed in this court, we decline to order such a hearing.

After the agency has reached its decision on Sears' specific claims, those decisions will be reviewed by this court. Where the agency agrees with Sears that the documentary portion in question contains material that should not be disclosed, the case will fit the more typical FOIA pattern in which the agency (GSA/OFCC) has refused disclosure and the information-seeker (intervenor CEP) has brought suit. Hence all such documentary portions should then be submitted to this court *in camera*, along with memoranda by Sears and the agency presenting their arguments for non-disclosure. Intervenor, at that time, will be given opportunity to respond appropriately. A hearing will be ordered if necessary.

(Footnote continued from preceding page.)

the court to tilt the balance in favor of disclosure." [Footnotes omitted] See *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F. 2d 73 (D. C. Cir. 1974). It appears unlikely, from the record, that any significant portion of the material will fall under this exemption. Hence agreement may be possible, particularly in light of intervenor's disclaimer of interest in information that will invade personal privacy.

In instances where the agency disagrees with Sears' contentions, Sears may, if it wishes, bring to this court those documents for *in camera* inspection, together with supporting memoranda. The agency and intervenor will then be afforded opportunity to respond. Documents which Sears does not bring to the court's attention will be ordered released by the agency to intervenor. Of course, documents which Sears does not bring to the agency's attention within 30 days as falling under (b)(4) or (b)(6) should be released by the agency immediately.

A few points are in order regarding the substance of Sears' burden under (b)(4). In its complaint, Sears argues that "disclosure will adversely affect the goodwill of Sears and further present opportunities for adverse publicity and unwarranted litigation, as the result of improper inferences and conclusions that may be drawn from such documents, with respect to plaintiff's equal employment opportunity position." (Paragraph 15.) In its Statement of Genuine Issue of Material Fact, Paragraph 17 amplifies the same fears of "irreparable harm." This fear of potential loss of goodwill is tenuous at best. It is just as likely that evidence of Sears' compliance with Executive Order 11,246 will enhance, not diminish Sears' corporate image. In any event, it is not actionable under the standards of *National Parks*.

In the affidavit of Alfred A. Kuehn,²⁵ however, Sears, alleges a different type of harm; disclosure, it is said, will allow Sears' competitors to compete more effectively with Sears by having access to "inside information." While the affidavit is limited to a discussion of the usefulness of statistical employee breakdowns,²⁶ it may be that Sears' AAP's also contain plans

25. This affidavit was originally sent to chambers enclosed in a letter of arguments from Sears' counsel dated May 28, 1974. Although never specifically requested to do so, this court docketed the affidavit on July 31, 1974.

26. Cf. *Westinghouse Electric Corporation v. Schlesinger, C. A. No. 118-74-A* (E. D. Va. April 2, 1974).

relating to "expansions, reductions, mergers,"²⁷ other planned "major shifts or changes in his personnel requirements,"²⁸ or information whose release "would constitute an unwarranted invasion of the privacy of an employee."²⁹ We believe that these are the factors that might lead to the "substantial harm to the competitive position," envisioned by *National Parks*, and these are the kind of factors which we will consider on review.³⁰

Accordingly, therefore, it is this 6th day of September, 1974,

Ordered that summary judgment be, and hereby is, granted in part for defendant and for intervenor, in accordance with this memorandum, and it is further

Ordered that further proceedings in this court be, and hereby are stayed to afford plaintiff an opportunity to exhaust its administrative remedies.

27. These factors were cited by the *Alameda* court, 349 F. Supp. 771 at 777.

28. 41 C. F. R. § 60-40.3(a)(1).

29. 41 C. F. R. § 60-40.3(a)(2).

30. Sears' belief that if . . . "defendants apply a less stringent standard for disclosure to others, than was applied here to plaintiff, their actions would be arbitrary and capricious," fails to convince the court that discovery is needed (Plaintiff's Memorandum of P. & A. p. 25). FOIA requests made of GSA or any other agency for documents legally indistinguishable from EEO-1's and AAP's should be governed by the same rules that govern disclosure of Sears' documents. I.e., unless those documents properly fall within exemptions (b)(4) or (b)(6), non-disclosure by an agency would violate the FOIA. Evidence that such violations occur, of course, will not advance Sears' cause in this action. If an agency properly withholds such documents under (b)(4) or (b)(6), however, it is doing no more than GSA can now do, on remand, with Sears' help.

APPENDIX C.

UNITED STATES COURT OF APPEALS,
District of Columbia Circuit.

No. 74-1946.

SEARS, ROEBUCK AND COMPANY,

Appellant,

vs.

GENERAL SERVICES ADMINISTRATION et al., Council on
Economic Priorities,

Intervenor-Plaintiff.

Dec. 9, 1974.

Before BAZELON, *Chief Judge* and LEVENTHAL, *Circuit Judge*.

PER CURIAM:

Sears, Roebuck & Company brought this action in the District Court, seeking to prevent disclosure under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, of EEO-1 forms and Affirmative Action Plans (AAP's) which Sears, as a government contractor, has been required to submit to the General Services Administration (GSA) and to the Office of Federal Contract Compliance, Department of Labor (OFCC) by Executive Order No. 11246, 30 F. R. 12319 (1965), as amended by Executive Order No. 11375, 32 F. R. 14303 (1967), and regulations promulgated thereunder. Disclosure is sought by Intervenor Council on Economic Priorities, a non-profit corporation which is currently preparing a study of the comparative

social performance of five major national retailers, including Sears. GSA and the OFCC, having first consulted the FOIA Committee of the Department of Justice, were willing to release the documents. These agencies offered Sears an opportunity to review the documents and point out any portions which were exempt from disclosure under either the FOIA or the OFCC disclosure regulations, 41 C. F. R. § 60-40.1 et seq.¹ Sears declined to follow this procedure because it maintained that the documents were *wholly* exempt under FOIA exemptions § 552(b)(3) (specifically exempted by statute) and § 552(b)(7) (investigatory files compiled for law enforcement purposes). Therefore it sought in District Court an injunction restraining the government from disclosing any of the information. The Council on Economic Priorities was permitted to intervene.

In an extremely careful and thorough opinion, 384 F. Supp. 996 (D. D. C. 1974), Judge Bryant held that the documents were not exempt either under (b)(3) or (b)(7) and, as to those claims, granted summary judgment for the government and the intervenor. However, because Sears argued in the alternative that large portions of the documents were exempt under (b)(4) and (b)(6), but had never specified for the government which portions it believed those sections protected, Judge Bryant stayed disposition of those claims pending agency review. Sears was directed to submit its (b)(4) and (b)(6) claims to GSA within 30 days; GSA, in turn, was ordered to release all portions of the information *not* brought to its attention by Sears in those claims.

1. The OFCC disclosure regulations implement the FOIA and provide for disclosure of all contract compliance documents, including AAP's, except as prohibited by law or by the regulations themselves. The latter permit the OFCC to withhold confidential commercial and financial information and, *inter alia*, "those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee." 41 C. F. R. § 60-40.3(a)(2).

Sears has appealed from Judge Bryant's order granting summary judgment for the government on the (b)(3) and (b)(7) claims. Having unsuccessfully sought a stay of that order in the District Court, Sears moved in this Court for a stay pending disposition of the appeal. Because shortage of time did not permit thorough consideration of the case when the motion was filed, this Court granted a temporary stay on October 10, 1974. But intervening weeks have permitted a more complete understanding of the case, and the Court is now convinced that the stay should be dissolved.

This Court's decision in *Virginia Petroleum Jobbers v. F. P. C.*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958) requires, *inter alia*, that one who seeks a stay demonstrate a strong likelihood of success on the merits. This Sears has failed to do. Its (b)(3) argument is based on three statutory provisions: § 709(e) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-8(e); 44 U. S. C. § 3508; and 18 U. S. C. § 1905. None of those provisions specifically exempts the documents from disclosure within the meaning of § 552(b)(3).

Section 709(e) is a criminal statute which prohibits officers and employees of the EEOC from making public information obtained by the Commission pursuant to its authority under Title VII. The EEO-1's herein were collected by the Joint Reporting Committee (JRC), which collects documents for and distributes them to both the EEOC and the OFCC. Although under some circumstances the EEOC does require the submission to EEO-1's, which the JRC collects for it, Judge Bryant correctly held that all of the documents herein were obtained by the JRC pursuant to Executive Orders 11246 and 11375 and *not* pursuant to the Commission's authority under Title VII. Further, members of the JRC are not officers or employees of the Commission. While the JRC may be an agent of the Commission when it acts for the Commission, it is an agent of the OFCC when it collects information for that agency pursuant to Executive Order 11246. Thus, the

data in question here was not collected by the EEOC, nor was it obtained pursuant to EEOC authority. Section 709(e) does not apply.²

Sears' argument that 44 U. S. C. § 3508 exempts the documents from disclosure must fail for similar reasons. Section 3508 prohibits agencies from disclosing confidential information received from other agencies which would not themselves be permitted by law to disclose it. As we have already explained, GSA and OFCC do *not* receive the data from the EEOC. Thus, the argument that GSA and OFCC cannot disclose the information because the EEOC, if in possession of such information, could not disclose it, is without merit.

Sears' final (b)(3) argument is based on 18 U. S. C. § 1905. This Court has indicated that § 1905 does not fall within the ambit of exemption (b)(3) because it does not itself define what information is exempt from disclosure. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 138 U. S. App. D. C. 147, 149 n. 5, 425 F. 2d 578, 580 n. 5 (1970); *Robertson v. Butterfield*, 162 U. S. App. D. C. 298, 300, 498 F. 2d 1031, 1033 n. 6 (1974).

Sears has also failed to demonstrate that it is likely to succeed on the merits of its (b)(7) claim. In two recent decisions, *Rural Housing Alliance v. U. S. Department of Agriculture*, 162 U. S. App. D. C. 122, 498 F. 2d 73 (1974), and *Center for National Policy Review v. Weinberger*, 163 U. S. App. D. C. 368, 502 F. 2d 370 (1974), this Court has distinguished between records compiled as part of a routine monitoring procedure and records compiled as part of "investigations which focus directly on specifically alleged illegal acts." *Rural Housing Alliance, supra*, 162 U. S. App. D. C. at 130, 498 F. 2d at 81. Records in the former category are not

2. As Judge Bryant noted, AAP's, which include the information contained in EEO-1's, are required by the OFCC regulations, 41 C. F. R. § 60-2.1 et seq., and are never required by the EEOC. Thus, no possible reading of § 709(e) could bar disclosure of AAP's.

protected by exemption (b)(7). The EEO-1's and AAP's which Sears, as a government contractor, was required to supply in order that its compliance with executive orders prohibiting employment discrimination could be monitored are not "investigatory files" and are not exempt from disclosure under (b)(7).

Therefore, since Sears has failed to demonstrate the probable success on the merits of its appeal required for continuance of the stay, the stay of the District Court's order which this Court granted on October 10 is dissolved, and GSA is directed to release forthwith all of the information sought herein which Sears has not specified as exempt under FOIA exemptions (b)(4) and (b)(6).

So ordered.

D1

APPENDIX D.

**UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit**

September Term, 1974

No. 74-1946

SEARS, ROEBUCK AND COMPANY,

Appellant,

v.

**GENERAL SERVICES ADMINISTRATION, et al.,
COUNCIL ON ECONOMIC PRIORITIES,**

Intervenor-Plaintiff.

Before: BAZELON, Chief Judge; and LEVENTHAL, Circuit Judge.

ORDER.

On consideration of the motion of the Chamber of Commerce of the United States of America (Chamber) for leave to file motion to intervene, of the Chamber's motion to accept brief on appeal, of intervenor's (Council on Economic Priorities) motion for summary affirmance, and of the responses of the parties to the foregoing motions, it is

ORDERED by the Court, *sua sponte*, that the above appeal is dismissed as moot, and it is

FURTHER ORDERED that the aforesaid motions are denied.

PER CURIAM

E1

APPENDIX E.

UNITED STATES DISTRICT COURT,
District of Columbia.

Civ. A. No. 2149-73.

SEARS, ROEBUCK AND CO.,

Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION, et al.,

Defendants,

and

THE COUNCIL ON ECONOMIC PRIORITIES,

Intervenor.

Sept. 26, 1975.

MEMORANDUM AND ORDER

BRYANT, *District Judge.*

In this action Sears, Roebuck and Company seeks a declaratory judgment to prevent the defendant General Services Administration ("GSA") and various federal government officials from disclosing to intervenor Council on Economic Priorities ("CEP") EEO-1 forms ("EEO-1's") and affirmative action plans ("AAP's") submitted by nineteen Sears branches to the General Services Administration and to the Office of Federal Contract Compliance, Department of Labor. The EEO-1 re-

ports, which contain statistics concerning the ethnic and sexual composition of Sears' work force, are required of large government contractors under penalty of contract cancellation.¹ Affirmative action plans outline steps proposed by the contractor to correct effects of past employment discrimination. All parties have moved for summary judgment.

This Freedom of Information Act case is before the Court in a reverse posture. Whereas the typical FOIA case is initiated by a party seeking to force the government to disclose information, here Sears has sued a government agency to prevent disclosure to the intervenor. In both types of cases a government official makes the initial decision as to whether to disclose the sought records, and more particularly whether the Act compels disclosure. Typically the party seeking the records sues in court after the government official has refused disclosure.² In the reverse FOIA case, as here, the government official has determined to disclose the documents, either because he finds that the Act compels disclosure, or that some other statute, regulation, or government policy requires him to comply with the request. Often the official does not reveal the basis of his decision to disclose in the reverse FOIA case.

The Freedom of Information Act provides in the relevant operative section that each agency shall promptly "make available to any person" all "identifiable records", but that the Act "shall not apply" to nine categories of exempted records. 5 U. S. C. § 552. Sears contends that the documents whose disclosure it sought to prevent fall within four of the exemptions.

1. Executive Order No. 11,246, 30 F. R. 12319 (1965), as amended by Executive Order No. 11,375, 32 F. R. 14303 (1967) and regulations promulgated thereunder. 41 C. F. R. § 60-2.1 et seq. (Revised Order 4) and 41 C. F. R. § 60-60.1 et seq. (Revised Order 14).

2. Here the government has refused to disclose a small portion of the records and the Court will review intervenor's challenge to that decision according to standards required in the typical FOIA case. See pp. 383, 384, *infra*.

This Court's Memorandum and Order of September 10, 1974, D. C. D. C., 384 F. Supp. 996, sets out the factual background and jurisdictional basis of the case, and contains the Court's initial ruling on the parties' cross-motions for summary judgment. In that Memorandum the Court ruled that the records do not fall within two of the Act's exempted categories, 5 U. S. C. § 552(b)(3) (exempted by statute) and (b)(7) (investigatory files),³ and directed Sears to exhaust with the agency its claim pursuant to the policies of two other exemptions, (b)(4) (trade secrets and confidential commercial data) and (b)(6) (personnel records).

THE STANDARD OF REVIEW

The Court remanded the case to the agency for consideration under its own procedure, 41 C. F. R. § 60—40.3 *et seq.*, with the expectation that Sears and the agency would reach an agreement regarding at least part of the material. Sears declined to designate 197 of 460 pages as exempt under (b)(4) and (b)(6), and GSA has released these documents. Moreover the

3. Sears continues to argue that the documents are exempt under (b)(3) and (b)(7), even though the U. S. Court of Appeals for the District of Columbia approved this Court's ruling on these two exemptions when it dissolved its stay of the September 10 Order, since Sears had failed to show likelihood of success on the merits of its appeal of this Court's ruling on those two exemptions. 166 U. S. App. D. C. 194, 509 F. 2d 527 (1974). Sears' single new argument is that a recent Supreme Court decision, *F. A. A. Administrator v. Robertson*, 422 U. S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975), requires the Court to reconsider its rejection of Sears' prior (b)(3) argument, since *Robertson* held that (b)(3) encompasses various federal statutes limiting government disclosure, including, according to Sears, 18 U. S. C. § 1905. Sears, however, misconceives the reach of section 1905. That statute merely makes it a criminal offense for a government official to disclose various types of confidential business data if "not authorized by law". Obviously 1905 has no applicability where disclosure is compelled by statute or is authorized by agency regulation or policy. Sears' 1905 arguments add nothing to Sears' other arguments that disclosure is prohibited. *Charles Rivers Park "A", Inc. v. H. U. D.*, 519 F. 2d 935 (D. C. Cir. 1975) nn. 5 & 6.

agency has accepted Sears' arguments as to portions of the documents naming Sears' employees and giving identifying details and evaluative comments. The intervenor has acquiesced to the deletion of employee names, addresses and phone numbers, but argues that the identifying characteristics must be disclosed pursuant to the Freedom of Information Act. Finally, as to a portion of the pages it declined to designate, Sears has not objected to the agency's remand decision.

The parties are again before the Court. Both Sears and CEP argue that the Court should set aside portions of the agency's order.

The threshold question in this case is whether Sears can invoke the Freedom of Information Act, or whether the plaintiff must rely on the judicial review section of the Administrative Procedure Act in its campaign to prevent disclosure. The FOIA itself gives Sears no cause of action in the face of a government decision to disclose, if that decision is not based on the requirements of the Freedom of Information Act. If the Act requires disclosure then the agency must make the records available regardless of any argument Sears might make. If the records are exempt then the Act "shall not apply", § 552(b). The Act simply does not prohibit disclosure of records which are exempt from its coverage.

However, Sears does have a right to a declaratory judgment on the issue of whether the contested material is exempt, if the government official's decision to disclose is based solely on his finding that he is compelled to do so by the Act. The "actual controversy", as required by the Declaratory Judgment Act, 28 U. S. C. § 2201, concerns whether contested records are exempt under the FOIA. Here Sears would simply be seeking a judicial interpretation of the law which it could use to convince the agency that the Act does not require disclosure. Thus the viability of Sears' cause of action under the FOIA depends entirely on the basis of the defendants' decision to disclose.

The government's initial pleadings indicated that it desired to release the records even if not compelled to do so by the FOIA.⁴ Accordingly in the September 10 Memorandum and Order this Court held that the FOIA does not apply to this case, and that to prevail Sears must show that the decision to release should be set aside under the judicial review section of the Administrative Procedure Act as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2)(A). Under this view of the case, the FOIA exemptions were relevant only as guidelines in measuring the agency's action.

More recently the government has made clear its position in this regard, which is that it has not yet determined whether it will release the data should the Court find that release is not compelled under the FOIA.⁵ Accordingly, it is appropriate for this Court to issue a declaratory judgment as to whether the contested documents are exempt under the Freedom of Information Act.⁶

The next legal issue, over which there has been much confusion and about which there has been much discussion by the parties in their papers, concerns the standard to be applied by this Court in its review of the agency's decision. All parties

4. See Motions of Defendants to Dismiss or, in the Alternative, for Summary Judgment, filed February 1, 1974, pp. 9-10, where defendants argue that the FOIA does not apply to this case because they may disclose the contested records even if not compelled to do so by the Act.

5. Motion of Defendants for Protective Order, filed June 6, 1975, p. 4.

6. This procedure is consistent with the procedure outlined by the Court of Appeals in *Charles Rivers Park*, *supra*. This Court's determination that none of the records which Sears seeks to prevent GSA from disclosing is exempt under the Act makes it unnecessary to reach the other issues discussed by the Court of Appeals in that decision.

If the agency were to decide to release any information which the Court found exempt under the FOIA, then the plaintiff could seek judicial review of that decision under the Administrative Procedure Act.

agree that the Information Act directs the Court to review, *de novo*, CEP's challenge to the agency's decision not to release portions of the documents. 5 U. S. C. § 552(a)(3). As to Sears' challenge to the agency decision, the standard of review depends wholly on the applicability of the Freedom of Information Act. The intervenor and the government correctly argue that if the Court were reviewing the agency decision pursuant to the Administrative Procedure Act it could set aside the agency's decision only on a finding that the decision was "arbitrary and capricious". *Camp v. Pitts*, 411 U. S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U. S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). But since Sears has filed a valid declaratory judgment action on whether any of the documents are exempt under the FOIA, this Court will apply the *de novo* standard mandated by the Information Act.⁷

Exemption (b)(4)

The data which Sears seeks to prevent from disclosure under exemption (b)(4) consists of various types of employment statistics for 19 Sears units. Section D of the EEO-1 reports consists of employment totals in nine occupational categories for each Sears unit, with columns detailing the sex and minority group status of employees. The Affirmative Action Plan reports include 19 job categories similarly broken down by race and sex, with separate tallies for hiring, terminations, training, and projected time tables for reaching affirmative action goals.

The (b)(4) exemption applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The September 10 Memorandum and

7. The Courts which have held that the Act applies in the reverse context have considered the exemptions *de novo*. *Westinghouse Electric Corp. v. Schlesinger*, 7 FEP Cases 682, 685 (E. D. Va. 1974); *U. S. Steel v. Schlesinger*, 8 FEP Cases 923 (E. D. Va. 1974).

Order discussed the applicability of that section to this case, and pointed out that the crux of the issue here is whether the EEO-1's and AAP's contain "trade secrets" or other material the disclosure of which will "cause substantial harm to the competitive position of" Sears. *National Parks and Conservation Association v. Morton*, 162 U. S. App. D. C. 223, 498 F. 2d 765, 770 (1974). After reviewing the documents submitted for *in camera* inspection and the affidavits submitted by the parties⁸ the Court concludes that Sears has not sustained its burden of showing that any materials contained in the EEO-1's and AAP's are exempt under (b)(4).

Since the September 10 remand Sears has submitted six affidavits from five experts,⁹ in support of its contention that release of the data contained in the documents would cause it substantial competitive harm. The affidavits filed by Sears' experts generally consist of assertions that a competitor could deduce from the EEO-1 and AAP employment totals estimates of Sears' labor costs, sales volume, and plans for expansion, coupled with claims as to the harmful effects which the release of the data might have upon Sears' competitive position. The affidavits, however, do not show that release of any or all the data would cause Sears substantial competitive injury, except for general assertions to that effect. Sears' experts have also declined to compare accuracy of estimates which could be made from the

8. Since the remand Sears has pressed for an evidentiary hearing. On July 1, 1975 this Court heard oral argument on the applicability of the (b)(4) and (b)(6) exemptions to the data and orally denied Sears' request for an evidentiary hearing on the ground that such a hearing would not add to the extensive affidavits and written pleading filed with the court and the agency. While there are conflicts between the Sears' affidavit and those of defendant and intervenor, these conflicts do not raise issues of material fact, but rather concern expert opinions as to the adverse consequences to Sears of release of the EEO-1 and AAP reports.

On the day of the oral hearing Sears moved for leave to file supplemental affidavits. By separate order the Court will grant that motion.

9. Sears submitted four of these affidavits to the agency. The agency forwarded the affidavits and pleadings of all parties with its decision. All these materials are part of the record here.

contested data with estimates which can be made from data which is presently available to Sears' competitors. Obviously the data is of some value, but without such a comparison the Court cannot, based on the affidavits, make a finding that release of the documents would cause Sears "substantial competitive injury".

A second deficiency which runs through the Sears' affidavits is the assumption by the Sears' experts that the GSA is releasing EEO-1's and AAP's for all Sears' units for several years. Since the information request at issue in this case is confined to nineteen Sears' units any ruling also must be so confined. Sears may raise its arguments relating to the release of other data only at the time the government proposes to release that data.

The deficiencies in the Sears' affidavits are ably identified in the affidavit of Sar A. Levitan, relied on by the defendant and intervenor. The Court embraces his affidavit and adopts his conclusion that the "EEO-1 and the affirmative action reports could not be of great usefulness to a Sears' competitor. The information which would be released could provide only the roughest approximation of sales volume, growth patterns, or labor costs. Equally accurate approximations are already possible without the use of these data".¹⁰

Exemption (b)(6)

Exemption (b)(6) applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". The exemp-

10. Levitan Aff., p. 7.

Sears also argues that release would cause it "substantial competitive injury" because the data would be useful to competitors in recruiting managerial personnel from Sears. Levitan also answers this argument by pointing out that with the names deleted it will be difficult to identify employees by using the AAP's and EEO-1's, and that, contrary to Sears' assertions, the reports do not identify disgruntled employees. Furthermore, even if the reports identified dissatisfied employees, it seems that a Sears' competitor who wished to hire a Sears' employee would offer him a job rather than following the circuitous route of first trying to determine the employee's attitude towards Sears. *Id.* at 7.

tion requires the court to "balance the right of privacy of affected individuals against the right of the public to be informed" keeping in mind that "the statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure". *Getman v. N. L. R. B.*, 156 U. S. App. D. C. 209, 450 F. 2d 670, 674 (1971); *Rural Housing Alliance v. U. S. Department of Agriculture*, 162 U. S. App. D. C. 122, 498 F. 2d 73, 77 (1974).

All parties agree that the names, addresses and phone numbers of employees should be deleted. In addition, the agency proposes to delete certain other identifying information and comments. CEP challenges this decision under the Freedom of Information Act.

The GSA deletions which the intervenor challenges fall into two categories—(1) comments including reasons applicants were not hired, reasons employees left Sears, and comments concerning promotions; and (2) service, termination, and promotion dates. The Court finds that the Freedom of Information Act requires that GSA disclose material contained in both these categories.

The agency in its remand opinion and the government in its brief identified relatively few pages with comments. Moreover most of these comments are harmless and certainly are not the type of "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".¹¹ CEP argues

11. For example several of the comments in the promotions section, which are the sections containing most of the comments, list the job to which the employee was promoted; others indicate the time when the employee will be ready for promotion. note that the employee has excelled, or that an employee refused an offer of promotion to a specified position. There are few negative comments concerning the termination of three minority employees which give as reasons for leaving "tardiness", "failure to report", and "performance not up to company standards". Affirmative Action Materials submitted for *in camera* inspection, p. 364.

The comments concerning reasons not hired on pages 47 and 48 of the defendant's submission to the Court are illegible. Since the only other information which will be released concerning these applicants is their ethnic identity and therefore the subject of those comments can not be identified, release of these comments, whatever they are, could in no way constitute an invasion of privacy.

that the comments are important to assessing employment discrimination. After weighing the public interest in disclosure of these comments and taking into consideration the character of the comments as well as the unlikelihood that it will be possible for members of the public to attach the comments to particular employees of Sears, the Court concludes that the comments do not fall within exemption (b)(6).

The dates of change in employment status involve no right of privacy directly. Apparently, the agency deleted them on the theory that these dates could be used to identify employees. Since these dates are important to comparing the advancement of ethnic minorities with others, these dates could be important to a study of Sears' employment practices with respect to minorities. Moreover, except for the comments discussed above, the other data is not personal in nature.¹² Again the public interest in disclosure of the dates of change in employment status, which are relevant to assessing employment discrimination, outweighs the minimal privacy interest especially since it is unlikely that the information can be tied to any individual.

Accordingly, it is this 26th day of September, 1975

Ordered that summary judgment be, and hereby is, granted for intervenor and in part for defendant, in accordance with this memorandum.

12. The reports show information such as ethnic group, sex, name of training course, and job title of employee.

APPENDIX F.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 75-1064

HUGHES AIRCRAFT COMPANY,
Plaintiff-Appellant,
vs.

JAMES A. SCHLESINGER, Secretary, U. S. Department of Defense; LT. GEN. WALLACE ROBINSON, Director Defense Supply Agency; PHILIP J. DAVIS, Director, Office of Federal Contract Compliance; PETER J. BRENNAN, Secretary Department of Labor,

Defendants-Appellees.

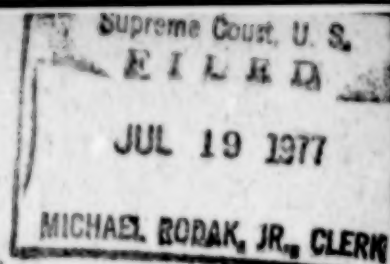
ORDER WITHDRAWING SUBMISSION

Before: BARNES, ELY and CHOY, *Circuit Judges.*

Submission for decision of this case is withdrawn pending the determination by the Supreme Court of the Government's petition for a writ of certiorari in *Brown v. Westinghouse*, Sup. Ct. No. 76-1192.

If the Court denies certiorari in *Brown*, this case will stand re-submitted as of the date of the denial of certiorari; and if the Court grants certiorari in the *Brown* case, this case will not be re-submitted until the Court's decision in *Brown* is filed, on which date this case will stand re-submitted.

No. 76-1642



In the Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO., PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 553 F. 2d 1378. An earlier opinion of the court of appeals, dissolving a temporary stay pending appeal, is reported at 509 F. 2d 527 (Pet. App. C). The memorandum opinions of the district court are reported at 384 F. Supp. 996 (Pet. App. B), and 402 F. Supp. 378 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. The petition for a writ of certiorari was filed on May 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether confidential statistical data contained in a private employer's EEO-1 reports and related affirmative action plans are exempt from mandatory disclosure under exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and 18 U.S.C. 1905.

2. Whether Section 709(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508(a) bar a federal agency other than the Equal Employment Opportunity Commission from disclosing a private employer's EEO-1 reports.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at Pet. 3-4.

STATEMENT

1. Petitioner brought this action in federal district court seeking to enjoin the federal respondents¹ from complying with a Freedom of Information Act request by respondent Council on Economic Priorities for the disclosure of certain documents that petitioner had furnished to the federal respondents pursuant to its contractual obligation to be an equal opportunity employer. See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303.²

¹The federal respondents are the General Services Administration and its Administrator and Director of Civil Rights, the Secretary of Labor, and the Director of the Office of Federal Contract Compliance of the Department of Labor.

²The Secretary of Labor, who is vested with overall responsibility for implementing the equal employment opportunity program established by the Executive Order, has delegated administrative responsibility to the Director of the Office of Federal Contract Compliance (OFCC). 41 C.F.R. 60-1.2. In turn, the Director has

The documents at issue are Equal Employment Opportunity Forms 100 (EEO-1's) and Affirmative Action Plans (AAP's), which government contractors are required to submit to the federal respondents to aid in monitoring compliance with the federal government's equal employment opportunity program. See 41 C.F.R. 60-1.7(a); 41 C.F.R. 60-1.40, 60-2.1, 60-60.2(a).

In the district court, petitioner claimed that disclosure of the documents was prohibited by various statutes (Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, 42 U.S.C. 2000e-8(e); 44 U.S.C. 3508; and 18 U.S.C. 1905) operating through exemption 3 of the FOIA,³ as well as by exemptions 4, 6 and 7 of the Act.⁴ Respondent Council on Economic Priorities was permitted to intervene as a party defendant.

designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. Respondent General Services Administration (GSA) is the compliance agency for petitioner.

³Exemption 3, 5 U.S.C. 552(b)(3), as amended (Pub. L. 94-409, 90 Stat. 1247, effective March 12, 1977), provides that the mandatory disclosure provisions of the FOIA do not apply to matters that are:

Specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

⁴Exemption 4 provides that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are— * * * trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Exemption 6 applies to information the disclosure of which would constitute "a

In its initial decision (Pet. App. B), the district court rejected petitioner's claims that disclosure of the documents in issue was precluded by Section 709(e), 44 U.S.C. 3508, 18 U.S.C. 1905, or exemption 7, and as to those issues granted summary judgment to respondents (Pet. App. B, pp. 5-12). With respect to petitioner's claims that portions of the documents were not disclosable under exemptions 4 and 6, the court ruled that the case was "not yet ripe for summary judgment" (Pet. App. B, pp. 12-16). Since petitioner had never specified at the agency level which portions of the documents it believed were covered by those exemptions, the court stayed proceedings on petitioner's claims under exemptions 4 and 6 pending further agency review (Pet. App. B, p. 15).

Petitioner obtained a temporary stay from the court of appeals of the portions of the district court's judgment adverse to it, and appealed. After further consideration, the court of appeals dissolved the stay, stating that petitioner had failed to show a likelihood of success on the merits (Pet. App. C). The court ordered the federal respondents "to release forthwith all of the information sought herein which * * * [petitioner] has not specified as exempt under FOIA exemptions (b)(4) and (b)(6)" (Pet. App. C, p. 5). In view of that order, the court of appeals dismissed the appeal as moot (Pet. App. D).

2. As directed by the district court (see *supra*), respondent GSA considered petitioner's claims under exemptions 4 and 6. After considering all submissions, the

clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7 protects investigatory records compiled for law enforcement purposes, "but only to the extent that the production of such records * * * would result in certain specific harms. 5 U.S.C. 552(b)(7).

agency concluded that, for the most part, petitioner had failed to establish that any portions of the documents in issue were covered by these exemptions.⁵

Petitioner thereafter reinstated its case in the district court to challenge this conclusion. The district court rejected petitioner's claims and granted summary judgment for the Council on Economic Priorities and, in part, for the federal respondents (Pet. App. E). The court concluded that exemption 4 was inapplicable because petitioner had not sustained its burden of showing that release of any information in the EEO-1 reports and AAP's in question was likely to cause it substantial competitive harm (Pet. App. E, pp. 6-8).⁶ Relying on the court of appeals' earlier ruling in the case, the district court rejected petitioner's reasserted argument that disclosure was prohibited by 18 U.S.C. 1905 (Pet. App. E, p. 3, r. 3).

On petitioner's second appeal, the court of appeals reversed and remanded the case to the district court for further proceedings (Pet. App. A). The court of appeals held that summary judgment on the exemption 4 issue was

⁵Respondent GSA, while rejecting petitioner's exemption 4 claims in their entirety, did conclude that certain limited portions of the documents were covered by exemption 6, and on that basis it determined not to disclose those portions. See 41 C.F.R. 60-40.3(a)(2).

⁶With respect to petitioner's exemption 6 claim, the district court noted that no one sought disclosure of the names, addresses, and phone numbers of persons referred to in the documents and held that the right of privacy of the affected individuals with respect to any other identifying information was outweighed by the public interest in disclosure (Pet. App. E, pp. 8-10). The court of appeals subsequently affirmed the district court's ruling on this issue (Pet. App. A, pp. 7-8).

inappropriate since material facts remained in dispute (Pet. App. A, pp. 4-7).

The court of appeals did not decide whether disclosure was barred by 18 U.S.C. 1905 and exemption 3. The court noted that the law on this issue is unsettled⁷ and that petitions for writs of certiorari raising the issue (as well as other questions) were pending before this Court. The court of appeals determined that under these circumstances it would be inadvisable to express an additional view (Pet. App. A, p. 11; footnotes omitted):

Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court on the aforementioned pending matters. * * * [L]acking decisive new guidance by the Supreme Court, the District Court is free to reconsider its view in light of all that has taken place subsequent to its original decision.

⁷Although in an earlier case the court of appeals had held that 18 U.S.C. 1905 was not a statute barring disclosure for purposes of exemption 3 (e.g., *Charles River Park "A", Inc. v. Department of Housing and Urban Development*, 519 F. 2d 935, 941 n. 7 (C.A. D.C.)), in this case the court noted that since then this Court had decided *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, and Congress thereafter had amended exemption 3 (Pub. L. 94-409, 90 Stat. 1247) with the announced intention of overriding the Court's interpretation of that provision (see note 9, *infra*). The court of appeals also recognized that in *National Parks and Conservation Ass'n. v. Kleppe*, 547 F. 2d 673 (C.A. D.C.), it had in *dicta* reaffirmed the view that Section 1905 was not an exemption 3 statute, but that that view conflicted with the ruling of the Fourth Circuit in *Westinghouse Electric Corporation v. Schlesinger*, 542 F. 2d 1190, 1203, certiorari denied *sub nom. Brown v. Westinghouse Electric Corporation, et al.*, No. 76-1192, May 16, 1977.

ARGUMENT

This case is another of an increasing number of so-called "reverse FOIA" suits by private parties seeking to enjoin the federal government from complying with FOIA requests. As noted in the government's petition for a writ of certiorari in *Brown v. Westinghouse Electric Corporation, et al.*, No. 76-1192, certiorari denied, May 16, 1977, such cases raise important questions concerning the purposes of the FOIA, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the executive branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the fullest responsible disclosure. However, the questions presented by the petitioner here either do not touch upon these fundamental concerns or, in the present posture of the case, are not ripe for review by this Court.⁸

1. Although presented separately, petitioner's two questions relating to 18 U.S.C. 1905 (Pet. 2) can be reformulated as one, *i.e.*, whether 18 U.S.C. 1905 is comprehended by exemption 3 of the FOIA so that information within its coverage is both exempt from mandatory disclosure under the FOIA and nondisclosable. Since the court of appeals expressly reserved judgment on this question, petitioner's attempt to present it to this Court is premature.

Moreover, petitioner's claim (Pet. 9) that the courts of appeals are divided on the question is incorrect. While

⁸This Court recently denied the petition for a writ of certiorari before judgment in *The Prudential Insurance Co. of America, et al. v. National Organization for Women, Washington, D.C., et al.*, No. 76-1052, certiorari denied, May 16, 1977, in which virtually identical questions were presented for review.

at one time there was such a conflict (compare *Sears, Roebuck and Co. v. General Services Administration*, 509 F. 2d 527, 529 (C.A.D.C.), with *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1203), the District of Columbia Circuit in this case receded from its earlier view. The court of appeals stated that in due course it will undertake to reconsider whether 18 U.S.C. 1905 is an exemption 3 statute (Pet. App. A, pp. 8-11), and it remanded the case to the district court with the instruction that it "is free to reconsider" the question (Pet. App. A, p. 11). Furthermore, the Fourth Circuit's decision in *Westinghouse Electric* does not appear to give consideration to a recent amendment to exemption 3 (see notes 3 and 7, *supra*) that was passed before the case was decided but had not yet become effective.⁹ See 542 F. 2d at 1196 n. 7. The Fourth Circuit has since had no occasion to reconsider its holding in light of the new wording of the statute.

Accordingly, neither the Fourth Circuit nor the District of Columbia Circuit can be said to have ruled definitively on the question petitioner would have this Court consider and it is therefore unnecessary at this time for the Court to settle the question.¹⁰

⁹The Fourth Circuit, in holding that 18 U.S.C. 1905 is an exemption 3 statute, relied in large measure upon this Court's decision in *Administrator, Federal Aviation Administration v. Robertson*, *supra*. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson*. See H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976).

¹⁰It is not clear in any event what practical significance this issue has for this or any other reverse FOIA case. 18 U.S.C. 1905 prohibits disclosure of certain categories of information unless otherwise authorized by law. It is the government's position that the disclosure regulations of the OFCC, 41 C.F.R. Part 60-40, which

2. The other question presented by petitioner is whether Section 709(e) and 44 U.S.C. 3508 prohibit the federal respondents from disclosing its EEO-1 reports.¹¹ Section 709(e) prohibits the disclosure by "any officer or employee of the [Equal Employment Opportunity] Commission" of information "obtained by the Commission pursuant to its authority * * * [under the Civil Rights Act of 1964]." 42 U.S.C. 2000e-8(e). However, as both the district court and the court of appeals pointed out (Pet. App. C, pp. 3-4; Pet. App. B, pp. 6-9), none of the documents at issue were obtained by the Equal Employment Opportunity Commission or under the authority of the Civil Rights Act of 1964. Instead, the EEO-1 reports at issue were obtained by respondent GSA pursuant to Executive Order 11246 and the regulations promulgated thereunder (41 C.F.R. Part 60). Moreover, none of the federal respondents is an "officer or employee of the Commission." Thus, the courts below correctly held that Section 709(e) by its own terms has no bearing upon the

govern the release of the documents involved here, provide the necessary authorization. If we are correct, it is immaterial whether exemption 3 incorporates 18 U.S.C. 1905.

Moreover, much of what petitioner would have protected from mandatory disclosure by exemption 3's incorporation of 18 U.S.C. 1905 would also be protected from mandatory disclosure by exemption 4. To the extent that information of the character described in 18 U.S.C. 1905 is exempt from mandatory disclosure by exemption 4, there is no need to determine whether the information also is protected by exemption 3.

¹¹The court of appeals indicated its dim view of the merits of petitioner's Section 709(e) claim in its December 9, 1974, opinion dissolving the temporary stay (Pet. App. C, pp. 3-4). There was no mention of that issue in the court of appeals' most recent decision in the case.

disclosability of the documents at issue in this case.¹² There is no conflict among the courts of appeals on this issue.¹³ See *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1199.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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¹²Similarly, the courts below correctly held that 44 U.S.C. 3508 also was inapplicable (Pet. App. C, p. 4; Pet. App. B, p. 8). That statute prohibits officials of one government agency from disclosing information received from another agency, where the transmitting agency is itself prohibited from publicly disclosing the information. Here, GSA did not receive petitioner's EEO-1 reports from the Commission, which is bound by the nondisclosure provision in Section 709(e), but, rather, from the Joint Reporting Committee, which is not bound by any such provisions. Accordingly, 44 U.S.C. 3508 does not make Section 709(e) applicable to this case.

¹³Justice Douglas once expressed the view that there is "a substantial question" concerning the applicability of Section 709(e) to cases like this one. *Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309, 1311-1312 (in chambers). That question, however, has been decided against petitioner's contentions by all the courts that have squarely faced it.